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In the Supreme Court of the United States

OCTOBER TERM, 1996

K.R., AN INFANT, BY HER PARENTS AND NEXT FRIENDS, M.R. AND K.R.R., ET AL., PETITIONERS

v.

ANDERSON COMMUNITY SCHOOL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Act requires participating States and localities to use their own funds to provide special-education services to disabled children whose parents have freely chosen to enroll them in private schools.

2. Whether respondent school district's refusal to provide certain benefits to private-school children violates the Religion Clauses of the First Amendment.

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This brief is submitted in response to the Court's order of December 2, 1996, inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. Part B of the Individuals with Disabilities Education Act (IDEA) provides federal grants to States and, through them, to local school districts for assistance in the education of disabled children. Under a statutory formula, each participating State receives federal grant money based on, among other factors, the number of disabled school-age children in that State. 20 U.S.C. 1411(a) (1994); see also IDEA § 611, as amended by the Individuals with Disabilities

Education Act Amendments of 1997 (IDEA Amendments Act).[1] In recent years, Congress has actually appropriated only about six to eight percent of the approximately $35 billion needed each year to provide special services to disabled children throughout the United States. See Pet. App. A5. Put another way, although States and localities spend almost $6,500 more per annum to educate the average disabled child than the average non-disabled child, recent federal grants have accounted for only about $400-$500 of that amount per disabled child.

A State participating in Part B of IDEA must ensure that each disabled child within that State

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[1] On June 4, 1997, the President signed the IDEA Amendments Act into law. We have lodged with this Court a copy of the enrolled version of the bill, and we have reprinted the most relevant provisions of the new statute in the appendix to this brief. See also H.R. 5, 105th Cong., 1st Sess. (1997) (reproduced at 143 Cong. Rec. H2498-H2531 (daily ed. May 13, 1997)); S. 717, 105th Cong., 1st Sess. (1997) (addressed at 143 Cong. Rec. S4401-S4413 (daily ed. May 14, 1997)). (At the time of this filing, the IDEA Amendments Act had not yet received a Public Law number.) The amendments relevant to the grant formula for Part B will become effective "with funds appropriated for fiscal year 1998," IDEA Amendments Act § 201(a)(2)(D), whereas the amendment to the substantive provision directly at issue in this case—IDEA (as amended) § 612(a)(10)(A)—became effective upon enactment. IDEA Amendments Act § 201(a)(1); see also note 6, *infra*.

Because most of the amendments to IDEA are formally contained within Section 101 of the IDEA Amendments Act, for convenience we will cite the section of the newly amended IDEA that the Amendments Act assigns to a given provision. In discussing the terms of IDEA, we will often cite the relevant provision of the newly amended IDEA together with the original provision, as codified in the 1994 edition of the United States Code, that the amended provision supersedes.

has available a "free appropriate public education," IDEA (as amended) § 612(a)(1)(A); see also 20 U.S.C. 1412(2)(B) (1994), that includes all special-education services necessary to meet that child's particular needs. See IDEA (as amended) § 612(a); see also 20 U.S.C. 1412(4), 1414(a)(5) (1994); 34 C.F.R. 300.341; see generally *Board of Educ.* v. *Rowley*, 458 U.S. 176 (1982). School districts within participating States may discharge that obligation in one of two ways: either by making all necessary services available to a disabled child in the public schools or, where those schools cannot accommodate a child's disabilities, by funding that child's education in a suitable private school. See IDEA (as amended) § 612(a)(10)(B) and (C); see also 20 U.S.C. 1412(2)(B), 1413(a)(4)(B)(i) (1994); 34 C.F.R. 300.401(b).

A public school district has no similar obligation, however, to fund the education of a disabled child placed by his or her parents in private school if the school district has offered to provide all necessary services to that child in the public schools. See IDEA (as amended) § 612(a)(10)(C)(i); see also 34 C.F.R. 300.403(a).[2] Nonetheless, IDEA does require school districts to provide some special-education benefits to disabled private-school children in general. The extent of that obligation is the issue presented in this case. Under the version of IDEA in effect when this petition was filed, a participating State was required to ensure that, "to the extent consistent with the

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[2] Unless otherwise indicated, we will use the term "private-school children" as a shorthand to denote the class of children whose parents have freely chosen to enroll them in private schools, as distinguished from children who were placed by their local school districts in private schools.

number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services." 20 U.S.C. 1413(a)(4)(A) (1994).

On June 4, 1997, however, the President signed into law the Individuals with Disabilities Education Act Amendments of 1997, see note 1, *supra*, which clarifies the limited extent of a participating State's obligation to disabled private-school children:

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services *in accordance with the following requirements* * * *.
>
> > (I) *Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.*
>
> * * * * *

IDEA (as amended) § 612(a)(10)(A)(i) (emphasis added); see also *id.* § 612(a)(10)(C)(i) ("[s]ubject to subparagraph (A), this part does not require a local educational agency to pay for" special-education services for children placed by their parents in private schools). IDEA thus directs participating States and

localities to allocate a proportionate share of *federal* special-education benefits to disabled private-school children. Cf. *Wheeler* v. *Barrera*, 417 U.S. 402, 405-406 & n.3 (1974) (discussing administrative role of local agencies in providing federal educational benefits to private-school children). As amended, however, IDEA makes clear that it imposes no obligation on States and localities to spend *their own* money on services for such children.

b. The Department of Education has promulgated two different sets of regulations relevant to a participating State's obligations to disabled private-school children: the Part 300 regulations, which are specifically designed to implement IDEA, and the more general Part 76 regulations, which are a subcategory of the Education Department General Administrative Regulations (EDGAR). The Part 76 regulations do not refer to IDEA specifically, but they are applicable to the implementation of that Act both because they apply by their own terms "to each State-administered program of the Department," see 34 C.F.R. 76.1(a), see also 34 C.F.R. 76.2, and because the Department has made them applicable to IDEA participants by incorporating them by reference in the Part 300 regulations, see 34 C.F.R. 300.451(b); see also 34 C.F.R. 300.3(a). The Department promulgated each set of regulations well before enactment of the IDEA Amendments Act in June 1997, and, to the extent that any given regulation is inconsistent with that Act, it is superseded.

Part 76 provides that each local school district must ensure, among other things, that "[t]he *program benefits* that [the school district] provides for students enrolled in private schools [are] comparable in quality, scope, and opportunity for participation

to the program benefits that the [school district] provides for students enrolled in public schools." 34 C.F.R. 76.654(a) (emphasis added). As discussed below (see pp. 10-11 & note 4; see also pp. 17-18 & note 9), the Department interprets the term "program benefits" as it appears in the Part 76 regulations to refer only to the benefits provided under the federal grant program established in Part B of IDEA, *not* to the range of services each school district provides to disabled children with a combination of federal, state, and local funds.

2. Petitioner K.R. is an elementary-school child who suffers from serious impairments of the brain and spine. Those impairments require her to use a wheelchair and to have a full-time assistant available to move, position, and secure her. Pet. App. A2. As K.R. approached kindergarten age, respondent Anderson Community School Corporation prepared an "individualized educational program" for her, as IDEA requires. See 20 U.S.C. 1401(a)(20), 1414(a)(5) (1994); see also IDEA (as amended) §§ 612(a)(4) and 614(d); IDEA Amendments Act § 201(a)(2)(A) (effective date). Under the terms of that program, K.R. would have received, at public expense, a full-time instructional assistant during school hours if her parents had enrolled her in the public schools. Pet. App. A2, A17-A18, A23; see also Pet. 5.

For religious reasons, however, K.R.'s parents chose to enroll her instead in a parochial school. Respondent agreed to transport K.R. to a public school for certain special services, such as speech therapy, but it declined to provide her with an instructional assistant who would accompany her during her regular classes at the parochial school. Pet. App. A2-A3. K.R. and her parents sought administrative review

of that decision within the Indiana Department of Education. See 20 U.S.C. 1415(b)(2) and (c) (1994). An independent state hearing officer ruled in favor of respondent, Pet. App. A43-A51, as did the Indiana Board of Special Education Appeals, *id.* at A52-A57.

Petitioners then brought suit in district court under 20 U.S.C. 1415(e)(2) (1994), contending that IDEA and its implementing regulations require the school district to provide K.R. with a full-time instructional assistant at her parochial school. The district court granted the requested relief, Pet. App. A16-A41, on the grounds that 34 C.F.R. 76.654(a) entitled K.R. to services "comparable" to what she would have received at public school, and that "there simply is no 'comparable' alternative to in-class services provided by an instructional assistant." Pet. App. A32-A33.

The court of appeals reversed. Pet. App. A1-A13. It held that the text of IDEA, *e.g.*, 20 U.S.C. 1413(a)(4)(A) (1994), "leaves little doubt that * * * Congress intended to give disabled students voluntarily attending private school a lesser entitlement" to special-education services than they would possess either if they attended public schools or if they were placed in private school at the direction of their school districts. Pet. App. A8. The Department's regulations, the court explained, track that same distinction. *Id.* at A8-A9. Although the court acknowledged that Section 76.654(a) "lends support" to petitioners' position, it held that, under "the only reasonable interpretation," that provision does not "mandate that private school students shall receive full benefits," but requires only that a school district ensure the "comparab[ility]" of any special-education services it actually chooses, in its broad discretion, to provide to voluntarily enrolled private-school stu-

dents. *Id.* at A9. Indeed, the court added, petitioners' contrary reading would be inconsistent both with IDEA itself and with the Department's long-standing interpretation of its own regulatory scheme. *Id.* at A10-A11 (citing *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994)). The court thus concluded that a "public school has discharged its obligation" where, as here, it "makes available the necessary service at a public institution, giving the disabled student a genuine opportunity to participate, and nothing in the record indicates that it has otherwise abused its discretion." *Id.* at A11-A12.

DISCUSSION

1. In recent years, IDEA grants have supplied participating States and localities with only six to eight percent of the total amount needed to fund special-education services for disabled children.[3] No party disputes that, by participating in IDEA, States and localities incur an obligation to allocate that limited *federal* grant money among disabled children in public and private schools. The principal question in this case is whether IDEA also compels participating States and localities to spend much of *their own* money to ensure that disabled private-school children receive publicly funded special-education services generally "comparable" to those provided to public-school children. The IDEA Amendments

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[3] In this brief, we use the term "special-education services" to denote the range of services provided to disabled children but not to non-disabled children. Thus, the total cost of providing those services is roughly equivalent to the aggregate difference in cost between educating the average disabled child and educating the average non-disabled child. See p. 2, *supra*.

Act, signed into law on June 4, 1997, unambiguously confirms that IDEA imposes no such obligation on program participants. In light of that legislative clarification, this Court's review of the first question presented in the petition is unwarranted.

a. Before passage of the IDEA Amendments Act, several courts of appeals had expressed disagreement concerning whether 20 U.S.C. 1413(a)(4)(A) (1994) and its implementing regulations required participating States and localities to provide generally "comparable" special-education services to public- and private-school children, even though that requirement would (as discussed below) inevitably compel substantial expenditures of state and local funds. When issued, the Seventh Circuit's decision in this case, which affirmed the broad discretion of participating state and local agencies to choose the best means of allocating their own educational resources, was consistent with the decision of the only other court of appeals to have addressed the matter. See *Goodall* v. *Stafford County Sch. Bd.*, 930 F.2d 363, 366-369 (4th Cir.), cert. denied, 502 U.S. 864 (1991); see also *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995), cert. denied, 116 S. Ct. 706 (1996).

In *Russman* v. *Sobol*, 85 F.3d 1050 (1996), petition for cert. pending *sub nom. Board of Educ.* v. *Russman*, No. 96-776 (filed Nov. 18, 1996), however, the Second Circuit construed Section 1413(a)(4)(A) to require each school district to underwrite for private-school children roughly the same on-site special-education services that it provides for public-school children, except where doing so would be "significantly more expensive than providing the same services at the public school." *Id.* at 1057. Similarly, in *Cefalu* v. *East Baton Rouge Parish School Board*, 103 F.3d 393

(1997), petitions for reh'g pending, No. 95-31045, a divided panel of the Fifth Circuit adopted an intricate burden-shifting test, under which "private school students usually will, absent justifiable non-economic considerations, be provided comparable services on-site to the extent that such services can be provided on-site at the same approximate cost as that incurred in providing the services at other sites." *Id.* at 398; but see *id.* at 399-405 (Barksdale, J., dissenting) (advocating Seventh Circuit's approach). Finally, in *Fowler* v. *Unified School District No. 259*, 107 F.3d 797 (1997), petition for cert. pending, No. 96-1633 (filed Apr. 14, 1997), the Tenth Circuit followed *Russman* and *Cefalu* but went one step further, interpreting IDEA and its regulations to compel each local school district, whenever a service would in fact cost more to provide to private-school students, to "pay for that service [in] an amount up to, but not more than, the average cost to the [d]istrict to provide that same service to [disabled] students in the public school setting." *Id.* at 807-808.

The Department of Education, to which Congress has given authority to administer Part B, see, *e.g.*, 20 U.S.C. 1402(a) (1994); IDEA (as amended) § 603(a), had long construed Section 1413(a)(4)(A), even before its recent amendment, in a manner consistent with the decisions in this case and *Goodall* and inconsistent with the decisions in *Russman*, *Cefalu*, and *Fowler*. In 1984, for example, in rejecting proposals to give "State and local educational agencies * * * 'full service responsibility' for [private-school] children," the Department affirmed that IDEA and its implementing regulations preserved the "discretion" of States and localities to provide special-education

services "to a number of, but not necessarily all, private school handicapped children." Final Regulations, Assistance to States for Education of Handicapped Children, 49 Fed. Reg. 48,520, 48,521-48,522 (1984); see also *id.* at 48,524 (Section 1413(a)(4)(A) gives no private-school child any "individual entitlement to services"). The Department has consistently followed that interpretation from 1977, when it adopted the original implementing regulations for Part B of IDEA, see *id.* at 48,522, through the present.[4]

b. In the absence of the IDEA Amendments Act, this Court's review might have been necessary to resolve the disagreement among the courts of appeals on the meaning of Section 1413(a)(4)(A) and its implementing regulations. That disagreement, however, no longer merits this Court's review, because the Amendments Act has effectively resolved it.

Because IDEA grants subsidize only a small percentage of the cost of providing special-education services to the average disabled student (see p. 2, *supra*), the expenditure of a proportionate share of those federal grants could not, standing alone, provide private-school students as a class with anything more than a small fraction of the publicly funded services that public-school children receive through a combination of federal, state, and local money. Because

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[4] See, *e.g.*, Department of Education Opinion Letter to Barbara Burch, 23 Individuals with Disabilities Educ. L. Rep. 560, 562 (1996) (under IDEA and implementing regulations, "a public agency is not required to serve each and every private school child residing in its jurisdiction, nor to make the full range of services available to those children whom it has elected to serve"); accord Pet. App. A10-A11 (citing additional administrative materials).

the decisions in *Russman Cefalu*, and *Fowler* would often entitle private-school children to the full range of publicly funded services they would receive if they attended public school, those decisions effectively compel school districts to spend not just a proportionate share of their federal grant money, but also a substantial portion of their state and local money as well, to satisfy their legal obligations to such children. In *Russman*, for example, the Second Circuit construed the language of Section 1413(a)(4)(A) to require school districts to provide each private-school child with any service that would be economically no less efficient to provide on private-school premises than on public-school premises, 85 F.3d at 1056, even though such services, no matter where they are provided, must be underwritten principally with state and local funds.

In our view, even before passage of the IDEA Amendments Act, that requirement—like the similar requirements imposed in *Cefalu* and *Fowler*—was difficult to reconcile with the statutory text, which did not by its terms (or as construed by the Secretary) impose any such requirement on the States as a condition for participation in Part B, and therefore should not be understood to have done so. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 190 n.11, 204 n.26 (1982); see also 20 U.S.C. 1413(d)(1) and (2)(A) (1994) (requiring the Secretary of Education to "bypass" a State's role in certain circumstances and to provide special-education services to private-school children, but only in "an amount per child which may not exceed the *Federal* amount provided per [disabled] child" to the relevant State during the previous fiscal year) (emphasis added). Indeed, the Department of Education has informed us that, under the approach

followed in *Russman*, *Cefalu*, and *Fowler*, a State's federally imposed financial obligations to private-school children could approach or actually exceed the amount of its federal funding, a plainly anomalous result that would give the States a strong incentive to withdraw from IDEA altogether.

But even if such a requirement had been consistent with IDEA in its original, unamended form, it is now irreconcilable with Section 612(a)(10)(A)(i)(I) of IDEA as recently amended. That provision, which Congress designed specifically to "resolve * * * the subject of an increasing amount of litigation in the last few years," S. Rep. No. 17, 105th Cong., 1st Sess. 13 (1997), confirms that a school district's obligation under IDEA to fund special-education services for the category of children who are enrolled by their parents in private schools is limited to "a proportionate amount of Federal funds made available under [Part B]." IDEA (as amended) § 612(a)(10)(A)(i)(I); see also *id.* § 612(a)(10)(C)(i) ("[s]ubject to subparagraph (A), this part does not require a local educational agency to pay for" special-education services for children placed by their parents in private schools).[5] Because States and localities provide the overwhelming majority of public funding for special-education services, Section 612(a)(10)(A)(i)(I) necessarily forecloses any

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[5] See also S. Rep. No. 17, *supra*, at 13 ("[T]he bill specifies that the total amount of money that must be spent to provide special education and related services to children in the state with disabilities who have been place[d] by their parents in private schools is limited to a proportional amount (that is, the amount consistent with the number and location of private school children with disabilities in the State) of the Federal funds available under part B."); H.R. Rep. No. 95, 105th Cong., 1st Sess. 92-93 (1997) (same).

claim under IDEA that a disabled child placed by his or her parents in private school has an individual entitlement to any particular special-education service available to public-school children. Petitioners' statutory claim to relief in this case is therefore now without merit. They assert, on petitioner K.R.'s behalf, an individual entitlement to a full-time instructional aide on private-school premises. They do not, however, assert that respondent has allocated less than a proportionate share of its federal funding to private-school students generally. Cf. *Blessing* v. *Freestone*, 117 S. Ct. 1353, 1361 (1997).[6]

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[6] Section 612(a)(10)(A)(i)(I) became effective upon enactment of the IDEA Amendments Act on June 4, 1997. IDEA Amendments Act § 201(a)(1). That Act contains no provision addressing whether or not its provisions will have retroactive effect. See generally *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994). As discussed in the text, we believe that Section 612(a)(10)(A)(i)(I) clarified, rather than altered, a school district's existing obligations under 20 U.S.C. 1413(a)(4)(A) (1994); if so, the issue of the new provision's retroactivity does not arise. Nonetheless, even if petitioners could now assert a right to retrospective relief for the denial of services during the period before passage of the IDEA Amendments Act, that issue, which the court of appeals of course did not address, will have little continuing significance and would not warrant this Court's review. Moreover, because the court of appeals denied any relief (either retrospective or prospective) to petitioners, see Pet. App. A12-A13, there is no need to vacate the judgment below and remand this case for further consideration in light of the IDEA Amendments Act, which would lead to the same result. In contrast, this Court may wish to consider such a remand in *Russman* (No. 96-776) and *Fowler* (No. 96-1633). In each of those cases, the court of appeals *granted* prospective relief on legal grounds that appear to be inconsistent with the IDEA Amendments Act. (We have served copies of this brief

c. In claiming an individual entitlement to specific services, petitioners also rely (see, *e.g.*, Pet. 21-23) on the Department of Education's implementing regulations. See also *Fowler*, 107 F.3d at 802-809; *Cefalu*, 103 F.3d at 395-398; *Russman*, 85 F.3d at 1054-1057. Even if those regulations could once have been construed to support petitioners' position, and (in our view) they did not have that effect, they would now be superseded in relevant part by Section 612(a)(10)(A)(i)(I).

Petitioners focus not on the Part 300 regulations, which the Department adopted specifically to implement IDEA,[7] but on the Part 76 regulations, which are broadly designed to "apply to each State-administered program of the Department," 34 C.F.R. 76.1(a). Those latter regulations subject local school districts to a variety of procedural and substantive obligations concerning "program benefits" and "program funds." For example, the "comparable benefits" provision, 34 C.F.R. 76.654(a), compels each local school district to ensure that "[t]he program benefits that [it] provides for students enrolled in private

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on counsel for the parties in *Russman* and *Fowler*, along with counsel for the parties in this case.)

[7] The Part 300 regulations track the language of 20 U.S.C. 1413(a)(4)(A) (1994), see 34 C.F.R. 300.451(a), and they further require each local school district to "provide special education and related services designed to meet the needs of private school children with disabilities residing in the jurisdiction of the [school district]," 34 C.F.R. 300.452. But they do not specify how comprehensive those services, or how large the class of beneficiaries, must be. In particular, nothing in the Part 300 regulations suggests that States and localities must spend their own funds, as opposed to a proportionate share of their federal grant, to satisfy their federal obligations to disabled children who are placed by their parents in private schools.

schools [are] comparable in quality, scope, and opportunity for participation to the program benefits that the [school district] provides for students enrolled in public schools."[8]

Like the Second, Fifth, and Tenth Circuits, petitioners interpret the Part 76 regulations to compel school districts, in many contexts, to make *their own* individual special-education "programs" equally available to public- and private-school children alike. See *Fowler*, 107 F.3d at 802-809; *Cefalu*, 103 F.3d at 395-398; *Russman*, 85 F.3d at 1054-1057. That position, however, misreads those regulations. The "program benefits" and "program funds" to which those regulations refer are most reasonably identified as the federal benefits and funds derived from the federal grant "program" under Part B of IDEA, not (as petitioners suggest) the actual set of services ultimate-

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[8] Part 76 also requires each school district, among other things, to "provide students enrolled in private schools with a genuine opportunity for equitable participation" in accordance with "the authorizing statute and implementing regulations for a program," 34 C.F.R. 76.651(a)(1); see also 34 C.F.R. 76.654(b); to determine the "needs of students enrolled in private schools," the "number of those students who will participate in a project," and the "benefits that the [school district] will provide under the program to those students" on a "basis comparable to that used by the [school district] in providing for participation of public school students," 34 C.F.R. 76.653; and to "spend the same average amount of program funds" on public- and private-school students who receive benefits under the program, unless the average cost of meeting the needs of private-school students is "different" from the average cost of meeting the needs of their public-school counterparts, in which case a school district "shall spend a different average amount on program benefits" for public- and private-school students, 34 C.F.R. 76.655.

ly offered, and principally paid for, by States and localities. Cf. Department of Health, Education, and Welfare, Final Regulations, Education Division General Administrative Regulations (HEW EDGAR Rules), 45 Fed. Reg. 22,494, 22,570-22,571 (1980).

To be sure, in mandating "comparability" only in the provision of *federal* "benefits" and "funds" to private-school children, the Part 76 regulations do little more than restate the statutory requirement that school districts allocate a proportionate share of their federal funds to private-school children.[9] Nonetheless, that is the only interpretation that reconciles those regulations with the text of IDEA

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[9] The generic Part 76 regulations were written to address a variety of federal grant programs that, unlike Part B of IDEA, fully fund whatever projects state and local recipients administer as part of those programs. In that (typical) context, it makes sense to impose on state and local agencies various qualitative requirements governing the allocation of "program benefits," because the educational services at issue are wholly identified with, and conceptually inseparable from, the federal grant program that completely underwrites them. Cf. HEW EDGAR Rules, 45 Fed. Reg. at 22,570-22,571 (conflating "services" that must be "comparable" under Part 76 regulations with "benefits" that are "federally funded"). Compared with other federal grant programs overseen by the Department of Education, IDEA is exceptional in that, in recent years, 92% to 94% of the funding for the services at issue has derived not from federal grants, but from the States and localities themselves. From that atypical circumstance arises a distinction, absent in other federal grant programs to education, between the ultimate "services" that States and localities provide to children and the federal "program" that underwrites a fraction of the cost of those services. That distinction, which was apparently unanticipated when the Part 76 regulations were promulgated, accounts for the reduced practical significance of those regulations in this context.

itself (see pp. 3-5, *supra*) and with the Department's own construction of the regulatory scheme as a whole (see pp. 10-11, *supra*). See generally *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). In any event, even if petitioners' reading of the Part 76 regulations had once been correct, those regulations would now be superseded in relevant part by the IDEA Amendments Act. As discussed above, that Act sharply limits a school district's obligations under IDEA to disabled private-school students, and it squarely forecloses petitioners' statutory claim of individual entitlement to specific, publicly funded special-education services comparable to those that the State and locality furnish with their own funds to disabled private-school children.[10]

2. In their second question presented (see Pet. i), petitioners contend that the "neutrality principle"

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[10] *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), upon which petitioners place heavy reliance (see Pet. 20-23), involved regulations implementing Title I of the Elementary and Secondary Education Act of 1965, which authorizes aid to children in certain low-income areas. Those regulations, which in some respects resembled the Part 76 regulations at issue here, required "comparable services" for public-school and private-school children alike. The plaintiffs in *Wheeler* were the parents of private-school children who had filed a class-action suit alleging that the services such children had received in a certain locality were inferior to the services provided to public-school children. This Court interpreted the Title I regulations to require true comparability in the services such children actually received. See 417 U.S. at 421-422 & n.17. The services at issue there, however, unlike the services at issue here, appear to have been funded entirely with federal grants and were therefore conceptually inseparable from the federal grant program itself; "comparability" thus required no expenditure of state or local money.

of the Religion Clauses of the First Amendment entitles K.R. to any special-education benefits she would have received had her parents enrolled her in public school. The court of appeals did not address that claim because petitioners did not raise it in that court until their petition for rehearing, cf. Pet. Reply Br. 5; this case is therefore an inappropriate vehicle for resolving the issue. In any event, the claim is without merit. Neither the Establishment Clause nor the Free Exercise Clause bars the government from allocating its limited educational resources principally to children attending public schools. See generally *Employment Div.* v. *Smith*, 494 U.S. 872 (1990); cf. *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.5 (1993).[11]

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[11] Although petitioners raised a claim under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, in the district court, see Pet. App. A21, A41, they do not present that claim in their certiorari petition in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the Individuals with Disabilities Education Act Amendments of 1997 (approved June 4, 1997).

Respectfully submitted.

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APPENDIX

As amended by Section 101 of the Individuals with Disabilities Education Act (IDEA) Amendments of 1997, Section 612(a)(10) of IDEA provides, in relevant part, as follows:

SEC. 612. STATE ELIGIBILITY.

(a) IN GENERAL.—A State is eligible for assistance under this part for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * * * *

(10) CHILDREN IN PRIVATE SCHOOLS.—

(A) CHILDREN ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS.—

(i) IN GENERAL.—To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements * * *:

(I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

* * * * *

(B) CHILDREN PLACED IN, OR REFERRED TO, PRIVATE SCHOOLS BY PUBLIC AGENCIES.—

(i) IN GENERAL.—Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

* * * * *

(C) PAYMENT FOR EDUCATION OF CHILDREN ENROLLED IN PRIVATE SCHOOLS WITHOUT CONSENT OF OR REFERRAL BY THE PUBLIC AGENCY.—

(i) IN GENERAL.—Subject to subparagraph (A), this part does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

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